

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RONALD OELKERS**  
Claimant

VS.

**EVCO WHOLESALE FOOD CORPORATION**  
Respondent

AND

**AMERICAN COMPENSATION INSURANCE  
COMPANY/RTW, INC.**  
Insurance Carrier

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Docket No. 1,000,198

**ORDER**

Respondent appeals the February 8, 2002 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Respondent contends claimant failed to prove accidental injury arising out of and in the course of his employment. Respondent also alleges that claimant had a preexisting back problem which claimant failed to advise respondent of at hire. Claimant contends he suffered an aggravation of his preexisting problem while employed with respondent. Respondent also objects to the award of temporary total disability compensation.

**ISSUES**

- (1) Did claimant suffer accidental injury on the date alleged?
- (2) Did claimant's accidental injury arise out of and in the course of his employment?
- (3) Is claimant entitled to temporary total disability compensation for the alleged accidental injury of September 28, 2001?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleged accidental injury on September 28, 2001, while picking up an 89-pound box. Claimant suffered the injury, but did not report the accident to any of his supervisors on that day. As his shift was about to conclude, claimant instead went home and spent the next two days resting. Claimant did go to the emergency room at Newman Memorial Hospital the following day. He then delivered to respondent an off-duty work slip shortly thereafter.

Respondent provided the testimony of Rob Shifflett, the director of operations, and Shelby Harvel, the personnel manager. Mr. Shifflett, a.k.a. Sarge, was contacted by claimant on October 1, 2001, and advised claimant was going to the hospital for an MRI. Mr. Shifflett prepared a note at that time, indicating claimant advised him that the injury was not work related. That note was then provided to Ms. Harvel.

Claimant, however, appeared at respondent's place of business on October 3, 2001, and filled out an accident report, claiming his injury to be work related. Claimant denied advising Mr. Shifflett that the injury was not related to the work.

The medical records contemporaneous with claimant's obtaining treatment do show claimant had a prior back claim while working for APAC. However, claimant's medical records contemporaneous to this accident also show claimant advised the doctors of a history of an injury on September 28, 2001, while lifting a box.

It is undisputed that claimant was on lifting limitations when he applied for work with respondent. Claimant, however, testified that he told his night supervisor, a man he identified as Marlin Miser, that he had prior back problems and was advised if he told respondent he would be fired. Therefore, claimant said nothing.

As all three witnesses testified before the Administrative Law Judge, the Administrative Law Judge had the opportunity to observe each witness testify and assess his or her credibility.

The Board, on many occasions, has addressed an administrative law judge's opportunity to assess the credibility of witnesses and generally defers to an administrative law judge's decision in that regard. Moreover, in this instance, claimant's testimony was so significantly credible that the Administrative Law Judge made specific note of it in the Order For Compensation. The Board, for purposes of preliminary hearing, accepts that observation and finds that claimant has proven for preliminary hearing purposes that he suffered accidental injury arising out of and in the course of his employment.

Respondent's contention that claimant is not temporarily totally disabled and, therefore, should not be granted temporary total disability compensation is not an issue, under K.S.A. 44-534a or K.S.A. 2001 Supp. 44-551, which is appealable from a preliminary hearing, and respondent's appeal on that issue is dismissed.

As is always the case, preliminary hearing findings are not binding in a full hearing on the claim, but are subject to a full presentation of facts.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated February 8, 2002, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2002.

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant  
Jeff K. Cooper, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director